

CHONG YUNG YAO

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v.

MENTERI KESELAMATAN DALAM
NEGERI MALAYSIA & ORS

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HIGH COURT MALAYA, MUAR

JEFFREY TAN J

[CRIMINAL APPLICATION NO: 44-52-2004]

26 MARCH 2005

PREVENTIVE DETENTION: *Detention - Application for habeas corpus - Preliminary objection - Whether allegations of failure to comply with s. 73(1) Internal Security Act 1960 irrelevant in an application for habeas corpus against detention order of Minister - Mohamed Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals - Kerajaan Malaysia & Ors v. Nasharuddin Nasir - Internal Security Act 1960, ss. 8, 73(1)*

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These were six applications for writs of *habeas corpus* to set at liberty the six applicants, who were presently detained by the Minister's detention orders under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 or s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. This judgment concerned a preliminary objection raised by the learned federal counsel ('the FC') that was primarily founded on the interpretation of the judgment of Steve Shim CJ (Sabah & Sarawak) ('his Lordship') in *Mohamed Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals*. The FC submitted that in *Mohamed Ezam (supra)*, the Federal Court as per his Lordship held that since it was already an order of the Minister under s. 8 of the Internal Security Act 1960 ('the ISA'), then all issues that related to s. 73 of the ISA did not concern the court, and that an order under s. 8 of the ISA could be made without the necessity of going through the procedure provided in s. 73 of the ISA. In *Kerajaan Malaysia & Ors v. Nasharuddin Nasir*, where it was contended that there was failure to comply with s. 73 of the ISA, the Federal Court held that where custody of the subject was no longer with the police but with the Minister, there should be a fresh motion against the order of the Minister and in the absence of such a motion, the court should not assume jurisdiction. In this instance, the main issue confronting this court was whether or not the preliminary objection raised by the FC had merits.

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a Held (dismissing the preliminary objection):

- [1]** It would appear that too much was read into the relevant excerpts from the judgment of his Lordship in *Mohamed Ezam (supra)*. In the context of *Mohamed Ezam (supra)*, the opinion of his Lordship in relation to the connection between ss. 8 and 73(1) of the ISA was clearly confined to the ISA. Too much was also made out of the case of *Nasharuddin (supra)*. Granted, it was held by the Federal Court in *Nasharuddin (supra)* that the court had no jurisdiction to hear an application for a writ of *habeas corpus* against the police when custody was no longer with the police. Consistent with his opinion in *Mohamed Ezam (supra)*, his Lordship held that there should be a fresh motion against the Minister. However, his Lordship did not say that allegations of failure to comply with s. 73(1) were irrelevant in an application for a writ of *habeas corpus* against a detention order of the Minister. There was no support at all for the proposition by the learned federal counsel, which if accepted, could mean the ouster of judicial review of even the procedure. There was no merit in this so-called preliminary objection and the parties were ordered to proceed with the hearing. (p 469 a-e)

Case(s) referred to:

- Cham Yoon Liang v. Menteri Hal Ehwal Dalam Negeri Malaysia* [1989] 2 CLJ 993;
[1989] 1 CLJ (Rep) 354 HC (**refd**)
Islamic Academy of Education & Anor v. State of Karnataka & Ors [2003] 3 LRI 483 (**refd**)
Karpal Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia [1988] 1 MLJ 468 (**refd**)
Kerajaan Malaysia v. Nasharuddin Nasir [2004] 1 CLJ 81 FC (**refd**)
Mohd Ezam Mohd Noor v. Ketua Polis Negara [2001] 4 CLJ 701 FC (**refd**)

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3, 4, 6(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)
Internal Security Act 1960, ss. 8, 73(1)

- g** (44-52-2004, 44-49-2004, 44-88-2004 & 44-89-2004)
For the applicants - Norma Goh Kim Lian; M/s Norma Goh & Co
(44-70-2004)
For the applicant - Suresh Thanabalasingam; M/s Kuldip & Co

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(44-80-2004)

For the applicant - MK Thas; M/s Azlan MK Thas & Co

For the respondents - Mohd Radhi Abas; A-G's Chambers

Reported by Suresh Nathan

JUDGMENT

Jeffrey Tan J:

These are 6 applications for writs of *habeas corpus*, to set at liberty the [6] applicants who are presently detained by detention orders of the Minister under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 or s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, which came about, rather unexpectedly, to be argued together, with respect to the issue below.

When 44-52-2004, the first of many applications listed for hearing on 12 March 2005 was called for hearing, learned Federal Counsel (FC), Mr. Mohd Radhi Abas for the respondent, said he had a preliminary objection. FC then asked for 44-88-2004 and 44-89-2004 to be called together. But Miss Norma Goh Kim Lian for the applicants in 44-49-04, 44-52-2004, 44-88-2004 and 44-89-2004 said she had no notice of the preliminary objection and was not ready to respond. FC then informed that the same preliminary objection would be raised in all applications listed for hearing on that day, and congenially suggested that his preliminary objection be argued in any one application and that the outcome be binding on all applications that concerned the Drugs (Special Preventive Measures) Act 1985 and the Emergency (Public Order and Prevention of Crime) Ordinance 1969. Miss Goh accepted that suggestion. Meantime waiting for their cases to be called were Mr. Suresh Thanabalasingam for the applicant in 44-70-04 and Mr. MK Thas for the applicant in 44-80-04. Mr. Suresh stood up and said he was ready to respond to the preliminary objection. And for good measure, Mr. Thas also agreed that the outcome of the preliminary objection would be binding on his application.

When it came to it, the preliminary objection was primarily founded on the interpretation of the judgment of Steve Shim CJ (Sabah & Sarawak) in *Mohd Ezam bin Mohd Noor v. Ketua Polis Negara* [2001] 4 CLJ 701. Learned FC submitted as follows. In *Mohd Ezam*, the Federal Court per Steve Shim CJ held that since it was already an order under s. 8 of the Internal Security Act (ISA) then all issues that related to s. 73 of the ISA did not concern the court, and that an order under s. 8 of the ISA could be made without the necessity of going through the procedure provided in s. 73 of the ISA. "My objection

- a* is that any failure to comply with the procedure under s. 73 of the ISA or similar procedure, would not taint the order of the Minister. Therefore, where there is an order of the Minister, the court should disregard all allegations of failure to comply with the procedure taken prior to the order of the Minister.” In *Kerajaan Malaysia v. Nasharuddin Nasir* [2004] 1 CLJ 81, 90, where it
- b* was contended that there was a failure to comply with s. 73 of the ISA, the Federal Court held that where custody of the subject is no longer with the police but with the Minister, there should be a fresh motion against the order of the Minister and in the absence of such a motion the court should not assume jurisdiction. Where there is an order by the Minister, all allegations
- c* against the police cannot be considered. “We need not answer to the allegations and or account for the procedure taken before the order of the Minister. My preliminary objection is that allegations of failure to comply with such procedure before the order of the Minister cannot be made, and all instant applications which are grounded on any alleged failure in the procedure before the order of the Minister should be dismissed.” Mohd Ezam concerned the
- d* ISA, but it would be the same for the Dangerous Drugs (Special Preventive Measures) Act 1985 and the Emergency (Public Order and Prevention of Crime) Ordinance 1969.

- e* Mr. Suresh answered that the Federal Court per Steve Shim CJ clearly said that a Minister must consider the police investigation and reports made under ss. 3 & 4 of the Dangerous Drugs (Special Preventive Measures) Act 1985. Learned counsel continued as follows. His Lordship in fact said that ss. 8 and 73 are connected, but yet could operate quite independently. His Lordship never said that ss. 8 and 73 are unconnected. In *Nasharuddin*, his Lordship merely
- f* said that the subjective satisfaction of the Minister could not be questioned. His Lordship never said that the procedural requirement under s. 73 of the ISA could not be questioned. All three Acts provide for judicial review. There is no question of any ouster of judicial review. Taking it from there, Miss Goh added that the instant applications concerned an order of the Minister, while *Mohd Ezam* and *Nasharuddin* concerned the detention before the order
- g* of the Minister. At 481, his Lordship held that the procedure under s. 73 was not followed. That said that the procedure before the order of the Minister was examined by the court. The process, from initial arrest to order of the Minister, is a continuous process (counsel cited *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia* [1988] 1 MLJ 468, and *Cham Yoon Liang v. Menteri Hal Ehwal Dalam Negeri Malaysia* [1989] 2 CLJ 993; [1989] 1 CLJ (Rep) 354).
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The 4 excerpts that learned FC cited from the judgment of his Lordship Steve Shim CJ in *Mohd Ezam* were the following. a

Excerpt 1

From the excerpts above, it seems clear that both *Re Tan Sri Raja Khalid* and *Theresa Lim* are decided principally on the basis that ss. 73(1) and 8 are inextricably linked and as such, s. 16 of the ISA which expressly applies to s. 8, should, by implication, also apply to s. 73(1), thereby giving rise to a situation where the court would be precluded from inquiring into the existence and/or sufficiency of the grounds under the section aforesaid. On that basis and reinforced by the provisions of cl. (3) of art. 151 of the Federal Constitution ('the Constitution'), they hold that the subjective test should apply in determining the words 'reason to believe' in s. 73(1). b
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Everything, it seems, turns upon this inextricable connection between ss. 73(1) and 8. Thus, it becomes an issue for consideration.

Excerpt 2 d

By 'inextricably connected' I would take it to mean that ss. 73(1) and 8 are wholly dependant on each other – that there has to be a police investigation under s. 73 before the minister can properly exercise his discretion to issue a detention order under s. 8, or conversely, that no detention order under s. 8 can properly be issued by the minister without the necessary investigation by the police under s. 73. In my view, such a proposition would have the effect of inhibiting or restricting the unfettered discretion of the minister. It would mean that the minister could not, on his own and independent of the police, conduct any investigation or take into consideration factors extraneous to those arising from police investigation under s. 73. What matters of national interest are infinitely varied. So are matters of national security of the state. These are the concerns of the minister. In the exercise of his discretion, he need not necessarily have to consider and rely on police investigation. This is implicit in the very nature of an unfettered discretion. There may well be other public considerations of political, social or economic nature having an impact on national security which are purely within his peculiar knowledge and which he considers relevant to his decision. Furthermore, police investigation under s. 73 may stop short of submission or reference to the minister where circumstances reveal insufficient evidence to warrant the continued detention of the detainee. In such a case, the matter would, quite conceivably, never reach the door of the minister. Does it then follow that the powers of the minister under s. 8 have become impotent and stagnant? e
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Excerpt 3

b Examined in the context stated, it must mean that although ss. 73(1) and 8 are connected, they can nevertheless operate quite independently of each other under certain circumstances. Section 8 is not necessarily dependent on s. 73(1) and *vice versa*. In the circumstances, it cannot therefore be said that they are ‘inextricably connected’. In this respect, I must, with the greatest respect, deter from the view expressed in *Re Tan Sri Raja Khalid* and *Theresa Lim*.

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c Excerpt 4

d For all the reasons stated, I find it appropriate to agree with the learned Chief Justice and my learned brother and sister judges in holding that the detentions of the appellants by the police under s. 73(1) of the ISA are therefore unlawful. In that context, I agree that the appeals should be allowed and the appellants released accordingly. However, as the undisputed facts show that the appellants, ie, first, third, fourth and fifth appellants have now been detained by order of the minister under s. 8 of the ISA, the issue of whether or not to grant the writ of *habeas corpus* for their release from current detention does not concern us. That is a matter of a different exercise.

e All 4 excerpts are clear, lucid and easily understandable. Given the clarity of the text, there should be no debate on its intended meaning. Excerpt 1 was the observation of his Lordship that both *Re Tan Sri Raja Khalid* and *Theresa Lim* were decided principally on the basis that ss. 73(1) and 8 are inextricably linked. Excerpt 2 was the explanation by his Lordship on the meaning of the words ‘inextricably connected’ – “I would take it to mean that ss. 73(1) and 8 are wholly dependant on each other – that there has to be a police investigation under s. 73 before the minister can properly exercise his discretion to issue a detention order under s. 8, or conversely, that no detention order under s. 8 can properly be issued by the minister without the necessary investigation by the police under s. 73”, and the learned observation of his Lordship that the proposition (“there has to be a police investigation under s. 73 before the minister can properly exercise his discretion to issue a detention order under s. 8, or conversely, that no detention order under s. 8 can properly be issued by the minister without the necessary investigation by the police under s. 73”) would have the effect of inhibiting or restricting the unfettered discretion of the minister – “In my view, such a proposition would have the effect of inhibiting or restricting the unfettered discretion of the minister. It would mean that the minister could not, on his own and independent of the police, conduct any investigation or take into consideration factors extraneous to those arising from police investigation under s. 73. What

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matters of national interest are infinitely varied. So are matters of national security of the state. These are the concerns of the minister. In the exercise of his discretion, he need not necessarily have to consider and rely on police investigation. This is implicit in the very nature of an unfettered discretion. There may well be other public considerations of political, social or economic nature having an impact on national security which are purely within his peculiar knowledge and which he considers relevant to his decision. Furthermore, police investigation under s. 73 may stop short of submission or reference to the minister where circumstances reveal insufficient evidence to warrant the continued detention of the detainee. In such a case, the matter would, quite conceivably, never reach the door of the minister. Does it then follow that the powers of the minister under s. 8 have become impotent and stagnant?"

Excerpt 3 was his Lordship's observation that ss. 8 and 73(1) can operate quite independently of each other under certain circumstances – "Examined in the context stated, it must mean that although ss. 73(1) and 8 are connected, they can nevertheless operate quite independently of each other under certain circumstances. Section 8 is not necessarily dependent on s. 73(1) and *vice versa*. In the circumstances, it cannot therefore be said that they are 'inextricably connected'. In this respect, I must, with the greatest respect, defer from the view expressed in *Re Tan Sri Raja Khalid and Theresa Lim*". His Lordship held that ss. 8 and 73(1) are connected, but disagreed that they are 'inextricably connected'.

And excerpt 4 contained his Lordship's conclusion that the detention under s. 73(1) was unlawful, but yet given that the subjects were no longer detained under s. 73(1) of the ISA but under an order of the Minister, the issue of whether or not to grant the writ of *habeas corpus* for his release from current detention did not concern the court – "For all the reasons stated, I find it appropriate to agree with the learned Chief Justice and my learned brother and sister judges in holding that the detentions of the appellants by the police under s. 73(1) of the ISA are therefore unlawful. In that context, I agree that the appeals should be allowed and the appellants released accordingly. However, as the undisputed facts show that the appellants, ie, first, third, fourth and fifth appellants have now been detained by order of the minister under s. 8 of the ISA, the issue of whether or not to grant the writ of *habeas corpus* for their release from current detention does not concern us. That is a matter of a different exercise."

- a* In effect, his Lordship pronounced that ss. 8 and 73(1) of the ISA are connected but yet independent under certain circumstances. His Lordship held that the detention under s. 73(1) was unlawful, but ordered not release on account of the fact that the appellants were no longer detained under s. 73(1). In the opinion of his Lordship, the issue of whether to grant the writ of *habeas corpus* for release from the detention order of the Minister was a matter of a different exercise. Granted, his Lordship agreed that there was a failure to comply with s. 73(1) but yet not ordered release on account of the fact that the subjects were no longer detained under s. 73(1). But it was not said or could it be so construed as said by his Lordship that the order of the Minister is not tainted by any failure to comply with s. 73(1) and or that the allegations against any such failure should be disregarded wherever there is an order of the Minister.

- d* In any event, it must be said that the learned opinion of his Lordship that “the issue of whether or not to grant the writ of *habeas corpus* for release from current detention (order of the Minister)” did not concern the court and was a matter of a separate exercise, was that of his Lordship and his Lordship alone. It should not be assumed that the entire bench held that opinion merely from the fact that all 4 distinguished judges (Mohamed Dzaiddin CJ (Federal Court), Steve Shim CJ, Abdul Malek Ahmad FJ (as he then was) and Siti Norma Yaakob FJ (as she then was)) concurred with the reasons appearing in their separate judgments. Mohamed Dzaiddin CJ, Abdul Malek Ahmad FJ, and Siti Norma Yaakob FJ ordered release from the detention order of the Minister, albeit that the appellants were no longer detained under s. 73(1). The fact that their Lordships ordered release evinced that their Lordships could not have held the opinion that “the issue of whether or not to grant the writ of *habeas corpus* for release from current detention (order of the Minister)” did not concern the court and was a matter of a separate exercise”. If that were the opinion of their Lordships, then their Lordships could not have ordered the release of the appellants from detention order of the Minister. It should be noted that their Lordships ordered release primarily on the ground that there had been a failure to comply with s. 73(1). And that clearly evinced that compliance with s. 73(1) is eminently pertinent to the issue of the grant or refusal of the writ of *habeas corpus* for release from the detention order of the Minister.

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With respect, it would appear that too much was read into the above 4 excerpts. A judgment cannot be read out of context. “The *ratio decidendi* of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety” (see *Islamic Academy of Education & Anor v. State of Karnataka & Ors* [2003] 3 LRI 483 at paras 123 & 124). In the context of *Mohd Ezam*, the opinion of Steve Shim CJ in relation to the connection between ss. 8 and 73(1) of the ISA was clearly confined to the ISA (see *Mohd Ezam*). a
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Clearly, if it was the intention of Parliament to impose a mandatory obligation on the part of the minister to consider the police investigation under s. 73 before he could issue a detention order under s. 8, Parliament would have expressly provided for it as she did in the Dangerous Drugs (Special Preventive Measures) Act 1985 ... c

Too much was made out of *Nasharuddin*’s case. Granted, it was held by the Federal Court in *Nasharuddin*, that the court has no jurisdiction to hear an application for a writ of *habeas corpus* against the police when custody is no longer with the police. Consistent with his opinion in *Mohd Ezam*, it was held by Steve Shim CJ in *Nasharuddin* that there should be a fresh motion against the Minister. But his Lordship did not say that allegations of failure to comply with s. 73(1) are irrelevant in an application for a writ of *habeas corpus* against the detention order of the Minister. Nope, there is no support at all for the proposition by the learned FC, which proposition if accepted could mean the ouster of judicial review of even the procedure. There is no merit in this so-called preliminary objection. Parties are ordered to proceed with hearing. d
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